Supreme Court, U.S.
FILED
DEC 21 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-887

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

**BASIN ELECTRIC POWER COOPERATIVE,**
**a North Dakota electric cooperative corporation,**

*Petitioner,*

VS.

**MIDWEST PROCESSING COMPANY,**
**a North Dakota corporation**

*Respondent.*

## BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

NEAL L. WOLF
*Counsel of Record*
ROBERT R. STEFFEK, JR.
*Attorneys for Midwest Processing Company, Respondent*

*Of Counsel:*

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600

December 19, 1985

BEST AVAILABLE COPY

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| TABLE OF AUTHORITIES | ii |
| STATUTORY PROVISIONS INVOLVED | iii |
| STATEMENT OF THE CASE | v |
| REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED | 2 |
| CONCLUSION | 6 |

## TABLE OF AUTHORITIES


| | PAGE(S) |
|---|---|
| *Cases* | |
| *Canute Steamship Company, Ltd. v. Pittsburgh & West Virginia Coal Company*, 263 U.S. 444 (1923) .... | 3-4 |
| *In the Matter of Gibraltor Amusements, Ltd.*, 291 F.2d 22 (2d Cir. 1961) *cert. den.* 368 U.S. 925 (1961) | 4-5 |
| *In re Godroy Wholesale Co.*, 37 Bankr. 496, 10 C.B.C.2d 249 (Bankr. D. Mass. 1984) ..... | 5 |
| *In re Mason*, 709 F.2d 1313 (9th Cir. 1983) ..... | 2-3 |
| *In re SBA Factors of Miami, Inc.*, 13 Bankr. 99, 8 B.C.D. 281, 4 C.B.C.2d 1335 (Bankr. S.D. Fla. 1981) ..... | 5 |
| *Universal Film Exchanges, Inc. v. Lust*, 479 F.2d 573 (4th Cir. 1973) ..... | 2-3 |
| *Statutes* | |
| 11 U.S.C. §303(b) ..... | *passim* |
| 11 U.S.C. §303(c) ..... | 4 |
| *Other Authorities* | |
| F.R. Civ. P. 60(b)(1) ..... | 2-3 |

## STATUTORY PROVISIONS INVOLVED

*Federal Rules*

11 U.S.C. §303(b)

An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title—

> (1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject on [sic] a bona fide dispute, or an indenture trustee representing such a holder, if such claims aggregate at least $5,000 more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;
>
> (2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $5,000 of such claims;
>
> (3) if such person is a partnership—
>
> (A) by fewer than all of the general partners in such partnership;
>
> (B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership;
>
> (4) by a foreign representative of the estate in a foreign proceeding concerning such person.

11 U.S.C. §303(c)

After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

## STATEMENT OF THE CASE

Respondent Midwest Processing Company ("Midwest") adopts the Statement Of The Case of Basin Electric Power Cooperative ("Basin") with the following exceptions:

1. The Agreements between Midwest and Basin did not provide that security for the improvements to the Neal Station would be maintained. (P.C. at 7)[1]

2. It is not true that Midwest renewed the Letter of Credit in April, 1983 recognizing Midwest's obligation to provide security under the Agreements. *(Id.)*

3. After the March 20, 1984 meeting between representatives of Midwest and Basin, Basin personnel met and decided to draw on the letter of credit. The written minutes of this meeting demonstrate that Basin knew that Midwest had 12 or more creditors and that Basin needed additional creditors to file a sufficient involuntary petition. (App. at C-13)[2]

4. It is not true that "[i]n a telephone conversation that the President of Midwest initiated, he stated that Midwest did not intend to renew the Letter of Credit and would not provide any alternate security." (P.C. at 7)

5. The statement that the District Court did not disturb the finding of the Bankruptcy Court that Midwest was unable to pay its debts when due is misleading. (P.C. at 12). The District Court specifically stated that it need reach or decide that issue. (App. at C-15)

---

[1] "P.C." refers to Petition for Certiorari

[2] "App." refers to Petitioner's Appendix.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

**BASIN ELECTRIC POWER COOPERATIVE,**
**a North Dakota electric cooperative corporation,**
*Petitioner,*

v.

**MIDWEST PROCESSING COMPANY,**
**a North Dakota corporation**
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Respondent, Midwest Processing Company ("Midwest")[3] respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit of Basin Electric Power Cooperative ("Basin") be denied.

This case is not worthy of certiorari because there are no conflicts between the Eighth Circuit and any other Circuit or the Supreme Court. Basin, in effect, asks the Court to rewrite Section 303(b) of the Bankruptcy Code and to render the three-creditor requirement contained therein meaningless.

Basin also asks the Court to engraft a definition of bad faith onto the Bankruptcy Code, even though the findings of bad faith by the Eighth Circuit are well supported by bankruptcy decisional law.

---

[3]The common stock of Midwest Processing Company is owned by A.E. Staley Manufacturing Company, Pillsbury Company and Neshem-Peterson & Associates.

## REASONS THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

### A. No Conflict Exists Between The Eighth Circuit And Any Other Circuit Or The Court

There is no conflict between *In re Mason*, 709 F.2d 1313 (9th Cir. 1983) and the decision of the Eighth Circuit. Basin misstates the holding of *Mason*, and the statement by the Ninth Circuit upon which Basin relies has no application to this case.

Basin argues that the Ninth Circuit in *Mason* held "that a petition by two creditors could not be dismissed unless the debtor could show a third creditor would not join." (P.C. at 15) The question of the proper filing of an involuntary petition was not before the *Mason* court and the court did not attempt to decide that issue.

In *Mason*, the Ninth Circuit upheld a bankruptcy court determination that an involuntary debtor had waived his right to object to the number of petitioning creditors by not raising the issue until after an order for relief was entered. The Ninth Circuit stated:

> We agree with the lower court's determination that Mason [the debtor] waived his right to present this defense by failing to raise it in an answer to the petition. The lack of the requisite number of petitioning creditors did not deprive the bankruptcy court of jurisdiction to enter a valid order for relief.

709 F.2d at 1318-19. In contrast, Basin has never argued that Midwest waived its right to object to Basin's one-creditor petition. As the Eighth Circuit stated: "Merely because the defects were subject to waiver does not excuse the intentional filing of a defective petition." (App. at A-8)

The debtor in *Mason* also argued that his failure to raise the defense of an insufficient number of petitioning creditors was excusable neglect or mistake, entitling him to set aside the order for relief under Rule 60(b)(1) of the Federal Rules of Civil Procedure. The court cited *Universal Film Exchanges, Inc.* v.

*Lust*, 479 F.2d 573 (4th Cir. 1973) wherein the Fourth Circuit stated:

> To prevail, the Rule 60(b)(1) movant must demonstrate that he has a meritorious defense *and* that arguably one of the four conditions for relief applies—mistake, inadvertence, surprise or excusable neglect.

*Id.* at 576 (emphasis in original). From thence comes the Ninth Circuit's statement, which Basin quotes: "The lack of three petitioning creditors would avail Mason only if he could show a third creditor would not join in the petition." 709 F.2d at 1319. Basin takes this quotation out of context.

The Ninth Circuit did not hold, as Basin claims, that an involuntary petition should not be dismissed unless the debtor can show that three creditors would not join the petition. The court was referring only to the requirement that, to set aside an order for relief under Rule 60(b)(1), a debtor must prove that he has a meritorious defense. In *Mason*, the defense was that no other creditor would have joined the petition. The court did not address the three creditor requirement.

Moreover, *Mason* did not involve a bad faith petition. The debtor in *Mason* did not contend that the two petitioning creditors knew that the debtor had twelve or more creditors. Midwest has shown that Basin filed its petition in bad faith, and Basin's petition was dismissed because of bad faith. There is no conflict between *Mason* and the present case.

There also is no conflict between the Court's decision in *Canute Steamship Company*, v. *Pittsburgh & West Virginia Coal Company*, 263 U.S. 444 (1923) and this case. In *Canute*, the Court held that the three-creditor requirement is not jurisdictional and is waivable, and that joinder of additional creditors does not amend the petition. None of these points is, or ever has been, in dispute in this case.

Basin has never argued that Midwest waived the defense of an insufficient number of petitioning creditors. Moreover, it is not the

joinder to two additional creditors, but the intentional filing of a deficient involuntary petition which warranted the dismissal of Basin's petition. The *Canute Steamship* case does not address this point.

Basin argues that the Eighth Circuit's decision runs afoul of Section 303(c) and bankruptcy procedure. Section 303(c) of the Bankruptcy Code allows additional creditors to join in an involuntary petition "as if such joining creditor were a petitioning creditor under subsection (b) of this section." *See also*, Bankruptcy Rule 1003(d). Section 303(c) is not in issue in this case. Basin ignored the three creditor requirement of Section 303(b) by filing a single creditor petition knowing that three creditors were required. This, and not the fact that two creditors later joined the petition, caused the dismissal of Basin's petition. Basin made the same argument to the Eighth Circuit and the court rejected it:

> Accepting appellant's [Basin's] argument would circumvent unduly the three creditor requirement of section 303(b). The three creditor requirement is not a meaningless formality that a creditor may ignore until after filing the involuntary petition. While an involuntary petition may be cured after filing when a single creditor file in good faith believing the debtor has fewer than twelve creditors, a single creditor may not file an involuntary petition knowing the debtor has twelve or more creditors.

(App. at A-6).

Finally, Basin argues that policies of the Bankruptcy Code are "well-served" by permitting a single creditor with knowledge of twelve or more creditors to file an involuntary petition and seek joinder of other creditors. Basin argues that "[w]hether the petitioning creditor knows the debtor has more or less than twelve creditors is irrelevant." (P.C. at 20) The policy Basin advocates is the policy the three creditor requirement was designed to avoid. As Judge Friendly noted in *In the Matter of Gibraltor Amusements, Ltd.*, 291 F.2d 22, 28 (2d Cir. 1961) (Friendly, J., dissenting), Congress enacted the three creditor requirement as part of the Bankruptcy Act of 1898 as a compromise "between

those who wanted to give the creditor an effective remedy to assure equal distribution of a bankrupt's assets and those who were determined to protect the debtor from the harrassment of ill-considered or oppressive involuntary petitions, including those by a single creditor interest." Adopting Basin's position would, as the District Court found, render the three creditor requirement of Section 303(b) meaningless. (App. at C-9) Basin's argument also ignores the concern expressed by courts that the stigma of bankruptcy attaches as soon as an involuntary petition is filed:

> An allegation of bankruptcy is a charge that ought not be made lightly. It usually chills the alleged debtor's credit and his sources of supply. It can scare away his customers. It leaves a permanent scar, even if promptly dismissed.

*In re SBA Factors of Miami, Inc.*, 13 Bankr. 99, 101, 8 B.C.D. 281, 4 C.B.C.2d 1335 (Bankr. S.D. Fla. 1981); *See also, In re Godroy Wholesale Co.*, 37 Bankr. 496, 500, 10 C.B.C.2d 249 (Bankr. D. Mass. 1984). The policy of the Code is better served by respecting the three creditor requirement of Section 303(b)—it is "not a meaningless formality which a creditor may ignore until after filing the involuntary petition." (App. at A-6)

**B. Basin Asks The Court To Rewrite Bankruptcy Law**

Basin asks the Court to grant certiorari to enable the Court to define bad faith as it applies to the Bankruptcy Code. The facts of this case do not require a refinement of the bad faith standard. Two factors led the District Court and the Eighth Circuit to conclude that Basin acted in bad faith: Basin intentionally filed a deficient petition, (App. at A-6, App. at C-11) and Basin improperly attempted to invoke the jurisdiction of the Bankruptcy Court to gain an advantage in a nonbankruptcy, contract dispute. (App. at A-9, App. at C-13).

Both findings are well-grounded in decisional law and the standards to be applied are clear. Basin's contention that only an objective standard should be applied to determine bad faith is belied by the substantial case law which the District Court cites

(App. at C-11, C-12) and the fact that the bankruptcy case upon which Basin relies also looks to subjective motivations in determining bad faith. The Court need not rewrite this consistent body of law.

## CONCLUSION

For the foregoing reasons, respondent Midwest Processing Company respectfully requests that the Petition for a Writ of Certiorari of Basin Electric Power Cooperative be denied.

Respectfully submitted,

NEAL L. WOLF
*Counsel of Record*
ROBERT R. STEFFEK, JR.

*Attorneys for Respondent Midwest Processing Company*

*Of Counsel:*

WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 558-5600